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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1609

STATE OF INDIANA,

Petitioner,

vs.

SCOTTSDALE MALL,

Respondent.

REPLY BRIEF IN RESPONSE TO BRIEFS OF THE STATES OF SOUTH CAROLINA AND PENNSYLVANIA

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The basic reason urged by the State of South Carolina for the writ is a conflict among the circuits. However, the basic argument of South Carolina is that a state highway, proposed for federal financing, "can never become a federal project." This conclusion is based upon the assertion that a State does and must have a continuing right to proceed with any project with State funds and that this right is guaranteed by 23 U.S.C. §145. As we have previously stated, the Seventh Circuit in no wise denied Indiana the right to proceed with the bypass with State funds and without federal funds or the right of any other State to do the same. What this case involves is the right and/or ability of a State to take a federal highway project to which NEPA applies and has applied and which has

proceeded under federal auspices up to the point of construction and switch it to a State project in order to avoid the obligation of NEPA compliance. As we have pointed out, every circuit faced with this question has concluded that the withdrawal from federal funding does not avoid the NEPA obligation. And, no circuit has concluded that with the federal funds goes the obligation to comply with NEPA or the right of a party plaintiff to require NEPA compliance by a State. Nor has any federal court agreed with the contentions of South Carolina that a "federal-aid highway can never become a federal project" or that NEPA doesn't apply to the several states where they participate in federal action. Quite the contrary, every federal court dealing with the subject has concluded that federal-aid highways are major federal actions and that the State in participating in such a highway is amenable to NEPA and judicial enforcement of the requirements of the Act.

So in terms of the first and basic argument of South Carolina, there is no conflict among the circuits; there is no case which supports that argument which is best evidenced by the fact that South Carolina cites no case in support of it.

The second argument of the State of South Carolina assumes that a federal-aid highway project can become federal for NEPA purposes and deals with the point in time when that occurs, the State urging that a conflict exists among the circuits on this question. In discussing this question, it is important to remember that the essence of the NEPA process is the Environmental Impact Statement (EIS) and the examination of alternatives required therein. To make the EIS meaningful, it obviously has to be prepared and circulated early in the process; hence, the requirement in 23 C.F.R. §771.5(b) that the EIS "be completed during the location stage, prior to the selection of a particular location."

South Carolina urges that this Court grant certiorari in order to decide the precise time at which a federal-aid highway becomes irrevocably amenable to NEPA and to resolve a perceived conflict on this point among the circuits. But the Court of Appeals in this case made no decision as to that precise point and in fact found that no such decision was necessary. Here we had a case where the State acknowledged NEPA applicability right up to the point of construction. If it wasn't federal for NEPA purposes at that point, it never could be. All the Court held was that a State having gone that far could not circumvent NEPA by a bookkeeping transaction.

So the decision sought by South Carolina is not responsive to the decision of the Court of Appeals in this case. In addition, the conflict South Carolina perceives, if it exists at all, is between other circuits not between other circuits and the instant decision of the Seventh Circuit. No circuit has held that, under the circumstances of this case, circumvention is possible. Finally, there is no real conflict in the decisions of other circuits. In *LaRaza Unida v. Volpe*, 488 F.2d 559 (9th Cir., 1973) the Ninth Circuit held that the point of NEPA applicability was location approval. In no wise is the ruling of *James River & Kanawha Canal Parks v. Richmond Metropolitan Authority*, 359 F.Supp. 611 (E.D. Va.) aff'd, 481 F.2d 1280 (4th Cir., 1973) in conflict with *LaRaza Unida*. The District Court decision, which was affirmed per curiam and without comment by the Fourth Circuit, was based upon the fact

that there was no federal involvement in the project at all. But at page 633 of *James River* appears the clearest and fullest statement possible of total agreement with the Ninth Circuit in *LaRaza Unida* and with the Seventh Circuit in this case. Nor does *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir.), cert. den., 409 U.S. 1000 (1972) present any conflict. In that case an injunction was ordered by the Fourth Circuit against federal and state defendants. The argument advanced by defendants was that it was too late to require NEPA compliance since the project was in the Plans, Specifications & Estimates (PS&E) stage when the Act became effective. All the Fourth Circuit said was that even at PS&E it was not too late to require NEPA compliance. The case of *Monroe County Conservation Council v. Volpe*, 472 F.2d 693 (2nd Cir., 1972) is identical to *Arlington Coalition* and too presents no conflict. The Second Circuit simply held that the project was not too far along to require NEPA compliance and required it. Neither is there any conflict posed by the decision of the Fifth Circuit in *Named Individual Members of San Antonio Conservation Soc'y v. Texas Hwy. Dept.*, 466 F.2d 1013 (5th Cir., 1971), cert. den., 406 U.S. 933 (1972). The Court held that the project had been federal "since the Secretary of Transportation authorized federal participation in the project on August 13, 1970." The action of August 13, 1970 in *San Antonio* was an authorization for construction. It also was the initial federal action on the project, there being in the record an affidavit of the Secretary of the Department of Transportation that prior to August 13 the federal government had never issued any approval of any kind on the project (for the reason that the only federal participation was to be in the actual construction of the highway). The Fifth Circuit did not hold that the project had been federal from the time the Secretary authorized "construction." It held that it had been federal from the time he authorized "federal participation." The holding in *San Antonio* is that the project was federal from the time the State obtained an option for federal funding, not from the time it exercised it. But more important and contrary to the basic argument of South Carolina, *San Antonio* is a case that holds: that a federal-aid highway is "major federal action" for NEPA purposes; that the States are amenable to NEPA and may be enjoined for failing to comply; and that the States may not circumvent and avoid NEPA by the identical bookkeeping "balancing act" used by the State of Indiana in this case.

It is interesting to note that in all of the cases relied upon by South Carolina, save one, the plaintiffs prevailed and an injunction was ordered by the Circuit Court against the federal or the federal and State authorities to cease and desist with reference to a federal-aid highway project. So there is a marvelous consistency among the circuits, the Seventh, the Ninth, the Fourth, and the Second to reject the constrained interpretation of NEPA demanded by the States and to apply NEPA "to the fullest extent possible." The only case in which defendants prevailed is *Citizens For A Balanced Environment v. Volpe*, 376 F.Supp. 806 (D. Conn.) aff'd, 503 F.2d 601 (2nd Cir., 1974), cert. den., 423 U.S. 870 (1975). The appellate decision says nothing as to the question of when NEPA first applies, holding only that it was not applicable. And a footnote at page 813 of the District Court opinion reveals that there was not even a claim that the specific project was

federal in and of itself. The only claim in the case was that the specific and smaller project was federal since it was a part of a larger project that was admittedly federal. The Court rejected this claim and the case has no application here.

So in effect there is no real conflict demonstrable among the circuits with the rule of *LaRaza Unida* and if there were it would not naturally be resolved in a review of the decision of the Seventh Circuit in this case since our Court of Appeals found it unnecessary to resolve the "first point of application" question.

As we have written this response to the State of South Carolina, we have been served with the Brief Amicus of the State of Pennsylvania. In it appears a repetition of the basic argument of South Carolina: that the Seventh Circuit infringes upon the State's right of eminent domain and to separately fund its own projects; that NEPA has no application to the States; and that the sole remedy for a NEPA violation is to enjoin the federal funds, not the project. As we have said, the decision in no way denies to Indiana the right to build the bypass with State funds or to acquire right-of-way for it. And every case on the subject assumes that: at least at some point the price of the option of federal funding is NEPA compliance; in this sense the act involves the States; and the penalty for non-compliance is an injunction against the project—not the money.

In support of its basic argument that the Seventh Circuit could not properly enjoin the State of Indiana, on the facts of our case, Pennsylvania relies upon *Proetta v. Dent*, 484 F.2d 1146 (2d Cir., 1973) which on its facts is just not in point. The basis of the denial of an injunction against the project (i.e. the City of New York) was that the City was not to receive the

federal funds. Indeed, the court infers that, if the City had been the recipient, injunction would be proper.

Pennsylvania also relies on *Bradford Township v. Illinois State Toll Highway Authority*, 463 F.2d 537 (7th Cir.), cert. den., 409 U.S. 1047 (1972) in which there wasn't even a claim of federal involvement. Finally, Pennsylvania at pages 7 and 12 of its brief, relies on *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir., 1971) as authority that NEPA has no application to the States. The case cited is historically referred to as *Ely I*. The case was an action against federal and state officials and dealt with a federal block grant to the State of Virginia to construct a penal institution. The court enjoined the grant pending NEPA compliance but declined to enjoin the State authorities. At this point, as is pointed out in *Ely v. Velde*, 497 F.2d 252 (4th Cir., 1974) (*Ely II*) at 254, the State not having drawn on the grant was free to build the institution with its own funds and with no necessity for NEPA compliance. However, after *Ely I*, the State elected to proceed with the federal financing and the State and federal officials prepared an EIS. There was adverse reaction and the State attempted to proceed using only State funds and shifting the federal grant to other less controversial projects. The plaintiffs of *Ely I* commenced *Ely II* and in *Ely II* the Fourth Circuit condemned the State officials in language equally applicable to Indiana, saying at page 255:

> "The State may not subvert that principle by a mere change in bookkeeping or by shifting funds from one project to another."

The Court ordered Virginia to pay back the grant resulting in a net loss of federal dollars to the State. In so doing, the Court stated at page 256:

> "Were this a highway construction case we would not hesitate to grant an injunction."

The Court goes on at page 257:

> "Unlike the segment of a highway whose *location* has been *approved*, the construction of the center does not involve an inseparable relationship . . . ." (Emphasis ours)

The rule of *Ely II* is the rule of *LaRaza*: NEPA applies to highway projects which become federal at location approval; and injunction is appropriate against a State to prevent circumvention or avoidance.

CONCLUSION

Neither Indiana, South Carolina, nor Pennsylvania can cite a case to support their basic and constrained view that federal-aid highways never become federal; that NEPA can't apply to State action even when coupled with and a part of federal action; and that the project can't be enjoined in order to prevent subversion of the Act. Further the secondary argument that certiorari ought to be granted at least to resolve conflict as to when such projects come with the NEPA umbrella fails because the very cases cited in support of conflict show that no such conflict exists. Finally, if such a conflict existed, its resolution would not and could not form a necessary element in the decisional process in the case at bar.

Respectfully submitted,

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